

ADVISORY OPINION NO. 2011-16

Issued On November 3, 2011 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An Appointed Member of a Board of Health who is also a member of a fraternal order seeks guidance on voting on matters which may affect the fraternal order.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a member of a fraternal order. She is not employed by the fraternal order nor is she a board member. She does not receive any financial benefit from her membership in the fraternal order. She does, on a volunteer basis, perform book work for the organization. The fraternal order operates a video lottery establishment.

The Requester is a Member of the Board of Health. She is a retired respiratory therapist.

The local Board of Health has adopted Clean Indoor Air regulations which, with limited exceptions, prohibit smoking in public places. Hence, this regulation impacts various fraternal organizations, including the Requester's. The Requester's fraternal order supports a regulation which allows certain establishments to have smoking and non-smoking areas.

Her fraternal order is a member of a county-wide fraternal organization whose members consist of various fraternal groups. This fraternal organization filed a lawsuit against the Board of Health. In the lawsuit the fraternal organization sought to have certain portions of the Clean Indoor Air regulations declared invalid. The Circuit Court denied the requested relief and dismissed the case. The fraternal organization has appealed the lower Court's decision to the Supreme Court.

The Requester states that as a member of the fraternal order, she has had no involvement in the lawsuit and, if authorized as a Board of Health Member to participate in decisions relating to the lawsuit, would not reveal confidential information to her fraternal order or the organization of which the order is a member. Nevertheless, she states that she wants to avoid any conflict of interest and hence seeks guidance from the Commission on voting on the lawsuit. She also seeks guidance on voting on Clean Indoor Air regulations.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b) reads in relevant part:

A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person.

W. Va. Code § 6B-2-5(e) reads:

No present or former public official or employee may knowingly and improperly disclose any confidential information acquired by him or her in the course of his or her official duties nor use such information to further his or her personal interests or the interests of another person.

W. Va. Code § 6B-2-5(j) reads in relevant part:

(j) *Limitations on Voting.*

(1) Public officials . . . may not vote on a matter:

(A) In which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest. Business with which they are associated means a business of which the person or an immediate family member is a director, officer, owner, employee, compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

(II) A public official may vote:

(A) If the public official, his or her spouse, immediate family members or relatives or business with which they are associated are affected as a member of, and to no greater extent than any other member of a profession, occupation, class of persons or class of businesses. A class shall consist of not fewer than five similarly situated persons or businesses; or

(3) For a public official's recusal to be effective, it is necessary to excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests, and recusing him or herself from voting on the issue.

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The Requester, in part, seeks guidance on whether she may vote on matters relating to a lawsuit in which the Board of Health is a party when the lawsuit was filed by an organization in which her fraternal order is a member. The situation presented is unique. The Requester has no direct interest in the lawsuit. Still, it is an adversarial proceeding and the Board Members have a fiduciary responsibility to defend the lawsuit in a manner determined to be in the best interest of the Board. The Requester is a member of a fraternal order which, through its membership in the fraternal organization, is an adverse party in the litigation. While not a named party, still the fraternal order is indirectly a party through its membership in the organization.

Based upon the facts presented, the Commission finds that the Requester may not vote on matters relating to the lawsuit. For purposes of determining litigation strategy, the Board is

entitled to engage in full and frank discussions with its attorney. It is essential that these attorney-client communications remain confidential. While there is no allegation that the Requester would reveal this confidential information to the fraternal order or organization of which it is a member, the limitations in the Ethics Act are intended to safeguard against the potential for abuse.

Hence, the Commission finds that the voting provisions in the Ethics Act, when read in conjunction with the private gain provisions, require the Requester to recuse herself from discussions or votes relating to the lawsuit. See Advisory Opinions 92-31, 99-19 and 2011-15. Pursuant to W.Va. Code § 6B-2-5(j)(3), in order for recusal to be proper, it is necessary for the Board Member to excuse herself from participating in the discussion and decision-making process by physically removing herself from the room during the period, fully disclosing her interests, and recusing herself from discussing or voting on the issue. Additionally, the minutes/record of the meeting must reflect the basis for the recusal and that the board member left the room during all consideration, discussion and vote on the item under consideration.

In regard to voting on the Clear Air regulations, a different analysis applies. The Requester has no financial interests which are affected by the Clean Air regulations. While she is a member of a non-profit fraternal order which has an interest in the regulations, her membership in the fraternal order does not require her to be recused from voting on Clean Air regulations. See A.O. 2009-06 where the Commission ruled that a City Council Member may vote on matters relating to a church in which he is a member absent a financial interest. See also A.O. 92-31 where the Commission ruled that a Board of Education Member could vote on general policy issues, not withstanding his prior involvement as a private citizen in a lawsuit.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et seq.* and W.Va. Code § 61-10-15, and does not purport to interpret other laws or rules. In accordance with W. Va. Code § 6B-2-3, this opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended or revoked, or the law is changed.

/s/ Kemp Morton

R. Kemp Morton, III Chairperson